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IN THE

# Supreme Court of the United States

No. 195

..... Term, 1964

GENERAL WAREHOUSEMEN AND EMPLOYEES UNION NO. 636 (AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA),

v.

AMERICAN HARDWARE SUPPLY COMPANY (OTHERWISE KNOWN AS AMERICAN HARDWARE STORES), a Pennsylvania corporation,
*Petitioner.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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## TABLE OF CONTENTS.


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement of the Case | 3 |
| Argument: | |
| 1. The decision of the Court of Appeals was not erroneous | 8 |
| 2. The federal question has been resolved by this Court | 12 |
| Conclusion | 14 |


### INDEX TO CITATIONS.

#### CASES.


| | |
|---|---|
| International Tel. and Tel. v. Local 400, 286 F. 2d 329 | 12 |
| John Wiley & Sons, Inc. v. Livingston, 84 S. Ct. 909 | 13, 14 |
| Machinists v. Crown Cork & Seal, 300 F. 2d 127 | 12 |
| Radio Corp. v. Assoc. of Professional Engineers, 291 F. 2d 105 | 12 |
| United Steelworkers v. American Mfg. Co., 363 U. S. 564 | 12 |
| United Steelworkers v. Enterprise Wheel & Car, 80 S. Ct. 1358 | 13 |
| United Steelworkers v. Warrior & Gulf Navigation, 363 U. S. 574 | 12 |
| Yale & Towne Mfg. v. Lodge 1717, 299 F. 2d 882 | 12 |


#### STATUTES.


| | |
|---|---|
| Labor Management Relations Act, 29 U. S. C. A. Sec. 158 | 11 |

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court:

The Respondent Union files this Brief and prays this Honorable Court to deny its grant of a Writ of Certiorari. The Petition seeks to review the decision of the United States District Court for the Western District of Pennsylvania refusing Petitioner's Motion For Summary Judgment and granting the Motion of General Warehousemen and Employees Union No. 636, affiliated with the "Teamsters" (hereinafter called the "Union"), for Summary Judgment. Petitioner's Motion was based, *inter alia*, upon

the payment and retention of agreed severance pay. The Union's Motion was based upon its contention that the matter was arbitrable.

## Opinions of the Courts Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 329 Fed. 2d 789 and appears in the Appendix to Petition at page 29.

The opinion of the United States District Court of the Western District of Pennsylvania has not been reported but appears in the Brief and Appendix for Appellants filed in the Circuit Court of Appeals at page 29a.

## Jurisdiction

The decision of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on March 25, 1964. The Order denying Rehearing was entered on April 23, 1964.

The jurisdiction of your Honorable Court is invoked under Title 28 U. S. C. A., Section 1254(1).

## Questions Presented

Where a labor agreement, containing a no-strike or lockout clause, provides for binding arbitration of all "differences and disputes as to the meaning and application of, or compliance with, the provisions of the agreement", is an employer required to submit to arbitration all differences and disputes during the term of the labor agreement arising out of the employer's predetermined decision to effect discriminatory discharges of its union employees upon the closing of its warehouse and the removal of its business and operations to another warehouse, where the labor

agreement further provides (1) its general purpose was to assure during its term "security and continuity of employment"; (2) that the employer would not engage in any "discrimination of any kind against any employee because of his membership or activity in the union"; (3) the employer recognizes the union "as the sole representative of all * * * employees for the purpose of collective bargaining"; (4) that nothing in the agreement is intended as a waiver of "any rights or protection granted to * * * any employees under the present * * * Federal * * * Laws"; and (5) that the grievance procedure applies to any dispute concerning "the management of the Company; the direction of the working force; the right to plan, direct and control Company operations; the right to introduce new * * * facilities, the right to alter or abolish existing * * * facilities".

**Statement of the Case**

The jurisdiction of the District Court was invoked under 29 U. S. C. A. 185(a) by the Union (a labor organization within the meaning of and as defined by Title 29 U. S. C. A. Section 152) against the Petitioner (an employer as defined by said Title 29 and Section 152).

Petitioner is a co-operative corporation distributing hardware at wholesale to its retail hardware dealer members in Pennsylvania, Ohio, West Virginia and other states. The Union is the General Warehousemen's Union No. 636, affiliated with the Teamsters (Company Petition, page 6).

Petitioner's only warehouse was in Pittsburgh, Allegheny County, Pennsylvania, and it and the Union have been parties to labor contracts negotiated by them since 1941 (Co. Petition, p. 6)

In 1960, after an economic strike of several months duration (due to the expiration of a labor agreement), the parties entered into a new labor agreement effective from 9/8/60 to midnight 7/1/63 (set forth in full in the Appendix for Appellees filed in the Circuit Court, at page 3b to page 13b).

During these negotiations upon a renewal agreement, and immediately prior thereto, the Board of Directors of the employer covertly determined "to move American from its present facilities" for the purpose of "rid(ding) itself of work practices that have been established over a long period of years * * * by leaving Allegheny County" (Appendix for Appellees filed in the Circuit Court, at page 30b), and by such move "the company would be free of obligation to the present warehouse employees" (Appendix for Appellees, *supra* at pp. 35-36b). The design, plan and scheme of the employer to move its warehouse facilities and business from Allegheny County, during the negotiations with the Union and concurrently with and even after it concluded and executed a renewal labor agreement, to get rid of the Union and discharge its union employees is reflected in the Minutes of the Board of Directors of the employer beginning from February 22, 1960, and extending to October 24, 1961 (set forth in full in the Appendix for Appellees, *supra*, at pp. 29b to 45b).

The labor agreement concluded and executed by the employer with the Union, effective from September 8, 1960, contrary to the covert and predetermined decision of the employer to rid itself of long established work practices, the Union and its Union employees by moving its warehouse outside of Allegheny County, provided (1) that the "purpose" and "consideration" of the agreement was to assure "security and continuity of employment (Appendix

for Appellees, *supra*, p. 3b); (2) that the employer recognized the Union during its term "as the sole representative of all * * * employees for the purpose of collective bargaining" (Appendix for Appellees, *supra*, p. 4b); (3) that the employer would not engage in any "discrimination of any kind against any employee because of his membership or activity in the Union" (Appendix for Appellees, *supra*, p. 5b); (4) that "the management of the Company; the direction of the working force; the right to plan, direct and control Company operations; the right to introduce new * * * facilities; the right to alter or abolish existing * * * facilities" as a management function "shall be processed through the grievance procedure" should any "dispute" arise thereunder (Appendix for Appellees, *supra*, p. 5b); (5) that the agreement is not to be construed as "waiving of any rights or protection granted to * * * any employees under the presen: * * * Federal * * * Laws" (Appendix for Appellee, *supra*, p. 9b); (6) that employees "laid off on account of reduction in force * * * will be laid off in accordance with seniority rights based on length of service" and they will be "re-employed in preference to outsiders" if "additional help is required" providing "their services are available to the Company" after "notice to the Shop Steward and written notice by registered mail sent to the employee at said employee's last address" (Appendix for Appellee, *supra*, p. 8b).

The labor agreement further provided for a no-strike and no-lockout clause (Appendix for Appellee, p. 9b) and binding arbitration (Appellee Appendix, *supra*, p. 7b), upon failure of the parties to settle "differences or disputes between the Company and the Union or employees * * * as to the meaning and application of, or compliance with, the provisions of this Agreement" (Appendix for Appellee, *supra*, p. 5b).

Approximately four months after the employer executed the collective bargaining agreement, the employer notified the Union by letter (January 27, 1961) of its intention to relocate its Pittsburgh warehouse to Butler County and that the completion date for building the Butler County warehouse was set for November 1, 1961 (Appendix for Appellee, *supra*, p. 14b). However, the employer's letter made no mention as to what disposition the Company proposed to do with its current complement of warehouse employees.

On March 13, 1961, the Union sent a letter to the employer acknowledging the contents of the employer's letter of January 27, 1961, and requested the employer to state what disposition the employer intended to make of the warehouse employees upon removal of the operations to the Butler County warehouse, and specifically whether the employer proposes to permit present employees to follow their work to the Butler County plant (Appendix for Appellee, pp. 15-16b).

Not having any reply from the employer to the March 13, 1961, letter, the Union again on June 1, 1961, forwarded to the employer another letter specifically inquiring again therein whether the employer proposes to afford its warehouse employees the opportunity to follow their work upon removal of the warehouse operations to Butler County. The letter further informed the employer that arbitration was requested under the Grievance Procedure of the current labor agreement if the employer did not propose to permit the warehouse employees of the opportunity to follow their work to the Butler County warehouse (Appendix for Appellee, *supra*, pp. 16-17b).

On June 16, 1961, the employer replied by letter wherein it was acknowledged that the subject had been under dis-

cussion between Union officials and employer attorneys, and further refused arbitration upon the grounds (1) the Union representation rights were limited to warehouse employees working in Allegheny County, and (2) the employer had the right of unilateral severance of employees allegedly under Article 12 of the current agreement, set forth in Appendix for Appellee, *supra*, pp. 10-11b (Appendix for Appellee, *supra*, pp. 18-19b).

On August 16, 1961, the Union sent a telegram to the employer that it has employed new employees at the Butler County warehouse contrary to the reemployment rights of laid off employees of the bargaining unit in preference to outsiders and again requested arbitration (Appendix for Appellee, *supra*, pp. 21-22b). By letter dated August 18, 1961, the employer again refused arbitration on the grounds contained in its letter of June 16, 1961 (Appendix for Appellee, *supra*, p. 23b).

The Union sent applications for employment for all the Allegheny County warehouse employees, signed by each employee, to the employer for employment at the Butler County warehouse prior to September 7, 1961, and all of the applications for such employment by the Union's members were rejected by the employer, notwithstanding that the Butler County warehouse was staffed with new employees (said Appendix, p. 24b); (said Appendix, p. 43b); (Co. Petition, p. 39).

On September 15, 1961, and again on October 13 and November 17, 1961, the employer called small groups of its Allegheny County warehouse employees into an office and gave to each of them a termination check which included weekly pay, pro-rata vacation pay and severance pay. In each instance, the Shop Steward, in the presence of and with the approval of the employees, objected to

lumping the aforesaid items in a single check and demanded separate checks for each item to afford each employee the right to refuse the severance pay tendered without prejudice to receipt of his weekly earnings. In each instance, the employer refused to do so (said Appendix, pp. 26 to 28b).

## Argument

**1. The decision of the Court of Appeals was not erroneous.**

As the basis for its request that a Writ of Certiorari be granted, the Petitioner alleges that:

1. This is of extreme national importance in the Labor Management Relations field.

2. This Court of Appeals has decided a Federal Question in conflict with your decisions in the Trilogy, and, particularly, in the American Manufacturing Company case. This calls for the exercise of your Honorable Court's power of supervision.

3. The Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals in the same matter.

In reply to 1. above, this case is not of extreme national importance in the Labor Management Relations field because the issues to be arbitrated have already been determined and settled to be arbitrable under the Trilogy decisions.

In reply to 2. above, the Federal Question decided by the Court of Appeals comports with the decisions in the Trilogy and is not in conflict therewith. In this posture, this

Honorable Court need not exercise its power of supervision in this case.

In reply to 3. above, there is no conflict in the decisions among Courts of Appeals and the subject matter of this case is not the same as decided by a Court of Appeals.

These replies will be argued more fully hereinafter.

The Petitioner primarily relies upon the contention that the collective bargaining agreement gives the employer the unilateral right to discontinue its Allegheny County warehouse, to sever employees and thereby to terminate their seniority upon paying the agreed severance pay (Co. Petition, p. 14).

The collective bargaining agreement states:

(Severance Clause)

> "When, in the sole judgment of the Company, it decides to discontinue operation of any portion of its wholesale house; the subject of this agreement; and if said discontinuance of operations would result in the permanent termination of employment of individuals covered by this agreement; said terminated employees shall be entitled to a severance allowance in accordance with and subject to the following provisions * * *" (Co. Petition, p. 7).

The agreement provides further that seniority shall terminate "if the employee is severed in accordance with Article XII (Severance Clause) of this agreement" (Co. Petition, p. 8).

But the collective agreement states something more than that. It also provides that the employer, in consideration of the agreement, assures the employees "security and continuity of employment". The "differences and disputes" contemplated by the grievance procedure and binding arbitration of the instant agreement embraces "the

meaning, application of, or compliance with" the agreement in a situation where the undisputed documentary evidence clearly concludes that before and after the signing of the agreement and concurrently therewith, the employer determined to rid itself of the Union and the Union employees and to rid itself of established work practices by removing its warehouse from Allegheny County to Butler County. In this circumstance, the difference or dispute embraced by the agreement is that the employer never intended to give employees "security and continuity of employment" during the term of the agreement. The "sole judgment" to be exercised by the employer in its decision to discontinue the operation of the Allegheny County warehouse and the severance of the employees is an honest and "good faith" judgment that does not entail deceit, fraud and misrepresentation. Whether there was a breach of the agreement in this respect is a matter for the arbitrator to determine under the terms of the agreement.

The agreement provides further that the employer shall not discriminate against any employee because of his membership or activity in the Union. This provision also modifies and limits the "sole judgment" to be exercised by the employer in any decision to discontinue the warehouse operation and the severance of employees. However, the undisputed documentary evidence of the employer clearly shows that its decision to remove its warehouse was motivated by anti-union animus, resulting in the discharges of all union warehouse employees and their rejection for employment and transfer to the new warehouse, and the employment at the new warehouse of new employees. This again is a breach of the agreement and is a matter for the arbitrator's determination under the terms of the agreement.

The Management Clause of the agreement further subjects "any dispute" thereunder to arbitration involving "the management of the Company; the direction of the working forces; the right to plan, direct and control Company operations; the right to introduce new facilities; the right to alter or abolish existing facilities". The agreement to submit such disputes to arbitration also modifies and limits the "sole judgment" to be exercised by the employer in discontinuing its warehouse operation at one location and removal of the same to another location, severing the warehouse employees from their employment without the opportunity being afforded them to follow their work. Such a dispute also is within the ambit of the grievance procedure and arbitration clause and is delegated to the arbitrator for his "award" which "shall be binding upon all parties hereto" (said Appendix, pp. 5 to 7b).

The agreement also reserves to employees "any rights or protection granted * * * under the present * * * Federal * * * Laws". Here again the parties stipulated that a discriminatory discharge arising under Section 8(a)(1) and Section 8(a)(3) of the Labor Management Relations Act, 29 U. S. C. A., Section 158, is a "difference or dispute" arising under the terms of the agreement and is subject to the arbitration clause.

The Petitioner may be in disagreement with the foregoing outline of the "differences and disputes" with the Union, but that disagreement is exactly the existing "differences or disputes between the Company and the Union or employees * * * as to the meaning and application of, or compliance with, provisions of this agreement" which "shall be settled" by the arbitration procedure (said Appendix, pp. 5 to 7b).

**2. The federal question has been resolved by this Court.**

This Court and the Circuit Court of Appeals for the Third Circuit consistently has held:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement".[1]

In this connection, it is important to note that no subject is excluded from the grievance and arbitration clause.

The Petitioner urges, since the collective agreement covers "persons employed by the Company at its wholesale house located in Allegheny County, Pennsylvania" (said Appendix, p. 4b), that there is no basis for a claim for arbitration of rights to employment at the Butler plant. Whether the collective agreement is to be interpreted as such, whether the contract has application to employment at the Butler warehouse, and whether the Petitioner had complied with the provisions of the agreement which have prejudiced the rights of employees in any respect is for the arbitrator. The collective agreement specifically provides, without any exclusions, that such matters are arbitrable. Such is the holding of this Court.

The Petitioner also urges since the collective agreement provides for severance allowances and the extinguishment of seniority in the event of discontinuance of operations, that there is no basis for a claim for arbitration. However, the Union and the employees contend that the severance resulting in loss of seniority was motivated and implemented by breaches of the contract by the Petitioner. Here

[1] United Steelworkers v. Warrior and Gulf Navigation, 363 U. S. 574; United Steelworkers v. American Mfg. Co., 363 U. S. 564, Radio Corp. of America v. Assoc. of Professional Engineers, 291 F. 2d 105; Inter. Tel. and Tel. v. Local 400, 286 F. 2d 329; Yale and Towne Mfg. v. Lodge 1717, 299 F. 2d 882, and cases cited therein at 883; Machinists v. Crown Cork and Seal, 300 F. 2d 127.

again, the "differences or disputes" relating to the meaning, application and compliance of the Petitioner's acts and conduct are not matters excluded by the collective agreement, but rather are matters which are included as arbitrable matters.

We respectfully contend that the "differences or disputes" between the Company and the Union or the employees concerns adherence to the terms of the agreement. There is a broad, comprehensive and unrestricted arbitration provision in the agreement. The parties thus should be referred to the arbitrator to determine the issues tendered for an award in accordance with his "informed judgment". The arbitrator is empowered by the collective agreement "to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations * * *"[2]

The Petitioner also suggests as a defense to the arbitrability of such differences or disputes whether the Union can almost a year later compel arbitration. Without attempting to state the numerous efforts of the Union to prevail upon the Petitioner to arbitrate or otherwise settle their differences or disputes, we respectfully submit that this matter should properly be submitted to the arbitrator in connection with whether the Union was in proper "compliance" or "meaning" with the arbitration provision of the agreement. Such ruling comports with the decision of this Court.[3]

We respectfully submit that contrary to the Petitioner's contentions, this case does not have "extreme national importance in the labor-management relations field", nor is

[2] United Steelworkers v. Enterprise Wheel & Car, 80 S. Ct. 1358, 1361

[3] John Wiley and Sons, Inc. v. Livingston, 84 S. Ct. 909, 917

the decision of the Court of Appeals in conflict with the Trilogy decisions, which merits review by this Honorable Court.

The third reason assigned by the Petitioner for granting the Writ by this Court is the apparent conflict between Circuit Courts on the question of whether "procedural arbitrability" is for the arbitrator (Co. Petition, pp. 26, 27). However, the cases cited by Petitioner arose prior to the decision of this Court in John Wiley and Sons, Inc. v. Livingston, 84 S. Ct. 909. In that case, at page 918, this Honorable Court finally settled this question by holding:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator".

## Conclusion

The decision below is in harmony with your decisions in the Trilogy cases and involves no conflict of decisions among the Courts of Appeal. It is, therefore, respectfully requested that the Petition be denied.

Respectfully submitted,

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